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19 FlatWorld Interactives LLC

20 UNITED STATES DISTRICT COURT

21 NORTHERN DISTRICT OF CALIFORNIA
22 SAN FRANCISCO DIVISION

23 FLATWORLD INTERACTIVES LLC, a
24 Pennsylvania limited liability company,

25 Plaintiff,

26 v.

27 APPLE INC., a California corporation,

28 Defendant.

No. C 12-01956 JSW

**FLATWORLD'S ADMINISTRATIVE
MOTION FOR *IN CAMERA* REVIEW
OF CERTAIN PRIVILEGED
DOCUMENTS**

**NOTED FOR DECISION ON JUNE
18, 2013**

JURY TRIAL REQUESTED

DATE ACTION FILED: April 19, 2012

1 Plaintiff FlatWorld Interactives LLC (“FlatWorld”) respectfully requests that the Court
 2 review *in camera* all documents that Apple’s motion to disqualify Hagens Berman Sobol Shapiro
 3 LLP (“Hagens Berman”) relies upon that were created either shortly before or any time after the
 4 date that Hagens Berman was engaged in this litigation. *See Meyer Decl.* at ¶ 2. This encompasses
 5 only 26 documents, which total only approximately 42 pages. These documents are described in
 6 an excerpt from the John McAleese amended privilege log and an excerpt from FlatWorld’s
 7 privilege log, which are attached as Exhibit A to the Declaration of Ryan Meyer (“Meyer Decl.”),
 8 concurrently filed as required by Local Civil Rule 7-11(a).¹ Prior to filing this motion, FlatWorld
 9 requested that Apple state whether it would oppose. Apple refused to take a position, but reserved
 10 its right to oppose. *Meyer Decl.* at ¶ 3.

11 Apple’s Motion to Disqualify Hagens Berman (*Dkt. #134*) is predicated on Apple’s
 12 allegation that John McAleese should be treated as co-counsel to Hagens Berman in this litigation
 13 based upon the nature and extent of his direct or indirect contacts with Hagens Berman attorneys.
 14 Because of the alleged co-counsel relationship between Hagens Berman and Mr. McAleese, Apple
 15 argues that disqualification and/or confidential information should be imputed vicariously from Mr.
 16 McAleese and/or Morgan Lewis & Bockius (“MLB”) to Hagens Berman. Apple argues that Mr.
 17 McAleese must be deemed to be Hagens Berman’s co-counsel because he provided legal advice
 18 and confidential Apple information either directly to Hagens Berman attorneys, or indirectly by
 19 using his wife Jennifer McAleese as a “conduit.” For both arguments, Apple relies primarily on
 20 speculation about privilege log entries for email strings that were forwarded to Mr. McAleese by
 21 “FlatWorld”—in all instances, in fact, by his wife Jennifer—and one reply email that he sent to his
 22
 23

24 ¹ FlatWorld identifies the following documents as communications between John and Jennifer
 25 McAleese that have occurred since January, 2012, and that are relied upon by Apple in its motion
 26 to disqualify Hagens Berman, for *in camera* review:

27 JMP*Priv*004, JMP*Priv*005, JMP*Priv*007, JMP*Priv*009, JMP*Priv*010, JMP*Priv*011, JMP*Priv*013, JMP*Priv*014,
 28 JMP*Priv*017, JMP*Priv*018, JMP*Priv*20, JMP*Priv*021, JMP*Priv*023, JMP*Priv*026, JMP*Priv*027, JMP*Priv*028,
 JMP*Priv*030, JMP*Priv*032, JMP*Priv*035, JMP*Priv*036, JMP*Priv*037, JMP*Priv*038, JMP*Priv*039, JMP*Priv*225,
 JMP*Priv*226, PR*IV*0407.

29 Duplicates of some of these documents appear also on the privilege logs of other entities.

1 wife and one email sending an HTML link to his wife, during the interval from shortly before
 2 Hagens Berman was engaged through the present.

3 FlatWorld's hands are tied in disputing Apple's mischaracterizations of these documents,
 4 because it cannot correct them without putting the applicable privileges at risk. The Court should
 5 not have to rely on Apple's lurid conjecture about the substance of these documents, or pick
 6 between the parties' respective characterizations of them in a vacuum. And FlatWorld should not
 7 be forced to waive privileges as the price to defend its choice of counsel. Rather, the Court should
 8 review the documents that Apple relies upon to impute disqualification from Mr. McAleese/MLB
 9 to Hagens Berman, and form its own conclusions. Because Jennifer McAleese asserts the spousal
 10 privilege for these documents, and because some of Mrs. McAleese's emails to her husband
 11 forward FlatWorld attorney-client communications, FlatWorld requests that the Court review them
 12 *in camera*.

13 In addition, on March 1, 2013, Mr. McAleese sent Mark Carlson, of Hagens Berman, an
 14 email request to draft language for an agreement with Apple to produce all documents that
 15 FlatWorld's privilege log indicates were authored or received by Mr. McAleese, provided that
 16 Apple would agree that production does not waive any applicable privileges. This document
 17 resides on the servers of MLB, but was not produced in response to either Apple or FlatWorld's
 18 subpoenas, nor was it logged on either Apple's or MLB's privilege log for MLB's document
 19 production, so the only copy available to FlatWorld is on Hagens Berman's server. Nevertheless,
 20 Apple has recently asserted that this document contains a confidential Apple attorney-client
 21 communication. FlatWorld sees no basis for this claim of privilege or confidentiality, and wishes
 22 to use this document in its opposition papers to demonstrate that Apple both knew of and
 23 encouraged Mr. McAleese's communications with Hagens Berman about Apple's objection to
 24 FlatWorld's privilege log. In view of Apple's claim of privilege for this document, however,
 25 FlatWorld requests that the Court review this two-page email *in camera*, as well.

26 Finally, at page 22 of Apple's disqualification motion (*Dkt. #134*), Apple alleges that a
 27 change to the description of entry PRIV0473 of FlatWorld's privilege log "appears designed to
 28 conceal [John McAleese's] involvement with FlatWorld and his role as a legal adviser." The

1 underlying communication includes Gordon Nelson, FlatWorld's patent prosecuting attorney, as a
2 recipient and internally addresses the need for additional legal advice. To address Apple's
3 allegation, FlatWorld requests that the Court also review this single-page email *in camera*.

4 For the reasons stated above, and to better inform the Court in deciding Apple's motion for
5 disqualification, FlatWorld respectfully requests that the Court review the listed documents *in*
6 *camera*. FlatWorld will await the Court's ruling on this administrative motion, then if the Court
7 agrees, promptly lodge copies of the documents described herein with the Court.

8 DATED: June 11, 2013

HAGENS BERMAN SOBOL SHAPIRO LLP

9 By /s/ Steve W. Berman
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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2013, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the email addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List. Any non-CM/ECF participants will be served by electronic mail, facsimile and/or overnight delivery.

/s/ Steve W. Berman

STEVE W. BERMAN